

Oral Advocacy

Debunking the Myths

Outline

- Features of Advocacy in UK/Commonwealth Disputes
 - The split profession – some practical points
 - Typical court procedure and why it may matter
 - Approach to evidence – documents and witnesses
- How do I win?
- Oral submissions
- Witness testimony

General Approach in UK and Commonwealth Disputes

- The split profession
- Brief fees and refreshers (settlement)
- Juggling instructions (demand issues)
- Default court procedure
- Timing of preparation

General Approach in UK and Commonwealth Disputes

- Emphasis on chronology – trial bundles
- Limited evidence in Chief
- No depositions
- Witness statements prevalent
- Witness hearings regarded as the crux of most disputes
- Reasonable degree of cynicism towards witness evidence
- Can prepare witnesses but cannot “coach” them

Gloster J's Findings - \$2.5 billion contract claim

“On my analysis of the entirety of the evidence, I found Mr. Berezovsky an unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes”

Gloster J, Berezovsky v Abramovich Action 2007 Folio 942

Differences between the High Court and Arbitration

- Time allowed: Baseball v. Cricket
- Application of rules of evidence
- “I put it to you.....” approach.....
-as opposed to building a record

Swiss Arbitrator's Explanation of "I put it to you.."

QC: You list in paragraph 4 what you say he said to you.

A: Yes – he said that they needed the money for their core business. They were going through a major fiscal crisis. Neverland was very much affected, and still is, most likely worst than most other countries, and that they needed the funds for – to support their core business and will not be investing in 2009.

QC: I put it to you that he didn't say any of those things, did he, Mr A?

A: Excuse me?

QC: I put it to you that he didn't say any of those things.

A: Were you there?

QC: Mr A, I am sorry, I am doing my job and I need to put my case to you, my client's case to you.

A: Well, it's nonsense.

MR K&S: Mr Chairman –

A: I think you asked me that and I told you I considered it extremely rude. You're accusing me of lying.

QC: Mr –

Swiss Arb: Perhaps we should explain something to you. For some reason English barristers have a strange rule that they must tell a witness that the witness is lying, so that afterwards they can argue this to the Tribunal. If they have not put it to the witness, as they like to say, then they think they cannot make that an argument.

A: So I shouldn't take offence.

Swiss Arb: So you shouldn't take it personally, because Mr QC is doing his job as he understands it as an English barrister.

A: I very much appreciate that.

Oral Submissions

- Impact of court approach
- Understatement
- Credibility, credibility, credibility
- Difference between bad points and weak points
- I submit/I believe
- Adapt and be prepared to drop points
- The ideal skeleton: readable, self-contained, structured and punchy
- Never forget: the law can be used to ambush

Cross Examination - Golden Rule #1

Cross cuts both ways

- Cross is as much about preparing your own witnesses as it is crossing the opposing party's witnesses
- Combining both process leads to significant advantages – discussed later
- Neglect either at your peril

Cross-examination - Golden Rule #2

What am I aiming to achieve?

- Most fundamental question and often forgotten
- Applies at a macro and micro level
- Who is this witness?
- What can they say about the key issues?
- What do I want them to say about the keys issues?

Cross-Examination - Golden Rule #2

What am I aiming to achieve? (cont'd)

- How can I make them say what I want or make them look bad by not admitting what I want them to say
- What will the “Audience” be expecting, particularly the Judge/Arbitrator
- This rule should permeate each and every step of the process
- If a line of questioning is not going directly or indirectly towards your goal stop!

Cross-Examination - Golden Rule #3

Work out whether you should use a machine gun or rifle

- Follows on from the forum discussion and nature of witness and their evidence
 - Long or short statement
 - How much of statement is controversial
 - How much of it really relates to the key issues
 - How much of it do you need to dismantle to win
 - What will the Judge/Tribunal expect
- Key question is whether you try to tackle most of the evidence or whether you aim for a surgical strike on a dispositive aspect of it

Machine Gun Required

- Tribunal of ex-English Judges who do not appear to have engaged with the detail
- Technical case involving allegations of sub-par performance on a major project
- Fact witness makes allegations as to poor performance over extended period of time
- Contemporaneous documents show inaccuracies, exaggeration and overstatement
- Need to discredit witness and draw Tribunal's attention to the strong contemporaneous evidence
- Need a machine gun

Rifle a better bet

- Tribunal of continental/international arbitration lawyers
- Case revolves around contract interpretation in respect of detailed agreement
- Statement cover broad range of issues including negotiating history and performance of terms
- You want to show that opposing party's interpretation is not commercially logical
- A rifle perhaps more appropriate

Three Stages of Preparation

- Never too early to start preparing, after all one of the most important parts of the case
- Preparation comes in many forms, *e.g.*
 - Setting the context of witness statement evidence to force opposing witnesses to address particular issues
 - Provoking a particular witness to give evidence by making direct allegations against them
 - Planning ahead for cross examination by gathering anecdotal points about opposing witnesses
- Three stages – drafting evidence, preparing witnesses and preparing cross itself

Stage 1

Drafting Evidence

- Sets the scene for the witness hearings
- Must think about cross at this stage and preparing your witness now
- As Claimant, what do you need to prove and what do you expect/want to receive from the other party in response
- As Defendant, how to attack the Claimant and improve position in cross by the contents of your statements
- Thus, two considerations –
 - how to enhance your position on cross by forcing the other party's hand
 - at the same time make your witnesses effective but small targets
- Second Golden Rule – what am I aiming to achieve - comes into play here

Stage 2

Preparing Your Witnesses

- More than just ensuring that they are ready
- Critical to preparing for your own cross
 - Usually fact witnesses have spent significant time working with or dealing with opposing fact witnesses
 - Therefore a great source of background information, thoughts on demeanor and weak spots as well as strengths
- Position similar in terms of experts
 - Often best provider of nuanced points for cross
 - Vital source of deeper understanding of expertise subject of expert opinion
- Thus, where possible, should always engage in prep of the witnesses whose testimony mirrors that of the witness you are to cross

Stage 3

Cross Outline

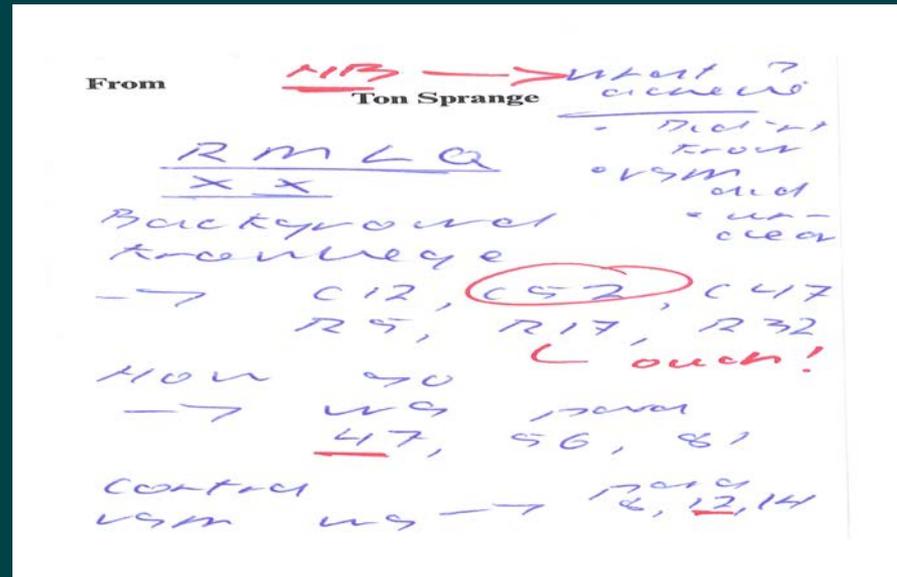
- No “right” way of doing it
- Personal preferences vary
 - One page cheat sheet with basics
 - Topic specific modules
 - Question by question outline
- What ever method, everything starts from the documents – if you don’t know them backwards, prepare for pain
- Outline should be regarded as a road map for the ideal route through the examination

Stage 3

Cross Outline (cont'd)

- Much of cross is focused on forcing a witness into a position where they either:
 - Have to agree to the position you are advancing because it is either logical or consistent with the balance of the evidence; or
 - Do not agree to it, but look bad as a result
- Therefore, accurate references to the record essential
 - Take the approach of trying to have something to contradict them on every topic
 - Remember the harsh glare of the hearing room and ensure that references really do support your position or point
- Must give you all you need to keep you focused on Golden Rule # 2

Cheat Sheet Example



Topic Specific Example

INITIAL DISCUSSIONS WITH RESPECT TO WAIVER

[ALL ON BASIS OF LONG WAIVER]

- *Discussions quickly began as to how this could be addressed E/65*
- *You had a call with A around 10:45 E/69*
- *Gist of that call was that either you waive the B and allow A to repay by 15 October 2208 with an indemnity in place OR you execute, right? E/76*
- *No mention of a 24-hour waiver by A or by you at that stage, right?*
- *The C approved the waiver approach, right? E/87*
- *This would be a waiver for 15 days right - that is what was sought, not for 24 hours E/76*
 - *No, this is what A reported back E/88*
 - *They said that 2 week waiver granted*
- *Also, onus shifted to the other banks*
- *You then spoke to the other banks, right? E/97, 99, 100, 102*
- *The outcome of these calls and the approval from the C was carefully summarized by A in his report at 16:16 E/106 [walk through contents]*
- *Then had a call with the Banks at 19:00 E/113*
 - *B made it clear that you supported A and would give waiver of 14 days whatever D you got (pg. 3)*
 - *You debated who should give the G and concluded that it should be A (pg. 9)*
 - *You discussed the disposal process (pg. 12)*
 - *At no stage did anyone suggest that the 24 waiver would require a G, right?*

The Examination

- Probably the most intense aspect of your job
- Like parenting and competitive sport nothing prepares you better for it than actually doing it
- No witness the same and therefore no examination the same
- No hard and fast rules, other than the following:
 - Belief
 - Eyes and ears
 - Adapt

Belief – Graphic Demonstration



Belief (cont'd)

- Enormous pressures brought to bear on examiner:
 - Judge/Arbitrator who wants speedy, quick efficient hearing and may have partial views
 - Opponent who wants to unsettle and disrupt you
 - Witness who does not want to agree with you
 - Client who is expecting great things
 - Colleagues who may be judging performance
- Thus many sources of stress and anxiety
- Belief is therefore key

Belief (cont'd)

- Must believe in your preparation, approach and execution in the face of things like:
 - Cantankerous Judges/Arbitrators who try and cut you off
 - Opponents that sledge, disrupt and bully
 - Witnesses who appearing to be doing well or are arrogant/smug
 - Clients who get nervous and start to doubt
 - Colleagues, particularly more illustrious ones, who coat tug
- Keep Calm and Carry On



**KEEP
CALM
AND
CARRY
ON**

Eyes and Ears

- Preparation and planning takes you to a point
- Registering what is actually happening is fundamental to turning good preparation into successful cross
- Head up, eyes and ears open, **absorb what is going on**
- Many factors to take into consideration *e.g.*
 - Is the witness well prepared, coping well, or nervous and ill prepared
 - How are opposing Counsel reacting
 - Is the Tribunal asleep or interested or annoyed
 - How are you going with Golden Rule # 2
- Sometimes difficult to gauge all of this but it is essential – must know what your audience thinks and what kind of progress is being made
 - When you can confer with colleagues, “how is this going”, “what does the Chairman think” “are we getting where we need to go”
 - Don’t be shy about taking a break to take stock

Eyes and Ears – Graphic Demonstration



Adapt

- You have retained your belief in your preparation and have your ears and eyes open
- Exploit both those things by adapting to developments
- Must avoid temptation to just plough through outline
 - Don't be afraid to cut back if you make good progress on an issue
 - If you are getting pounded on an issue, no shame in moving on, you can always come back to it
 - If the Tribunal butts in or makes noises, listen carefully as may give you a strong sense of their thinking
 - If opposing Counsel flips out or overly objects, you may be onto something
- Relentless focus on Golden Rule # 2, what do I want to achieve
 - Apply this test to individual questions, topics, and the witness generally
 - Once you get to where you need, STOP!
- Success is not ticking off all the questions in the outline – it is getting the evidence you want
- Very rare that simply following outline will get you there – must adapt

Failure to adapt – Graphic demonstrations



Failure to adapt – Graphic demonstrations (cont'd)



GOOD LUCK!