The 'over-eager' judge

Dr Chris Pamplin looks at how far a judge can go in taking a proactive role towards experts in proceedings

It is part of the judge's role to oversee the questioning of witnesses. Judges are rarely taciturn, and many is the expert who has been on the wrong end of an acerbic judicial comment. But how far can a judge go in this? A case came before the Court of Appeal recently in which the court took the opportunity to make some useful observations on what is permissible.

The case concerned was *Shaw v Grouby* [2017] EWCA Civ 233. It involved a boundary dispute, right of access and encroachment on land in which the judge found in favour of the claimant. During the course of the trial, the trial judge had reportedly made many interjections. Indeed, according to the defendant, the judge had all but taken over cross-examination. It was alleged that he had conducted a detailed examination of the experts with a view to getting them to agree to his views, and at one point began to answer the questions that had been put to the expert by counsel in cross-examination.

Judge usurping the advocate?

It might be argued, therefore, that the judge usurped the role of the advocate, and that the number and nature of his interjections prevented the witnesses from fairly putting their evidence. It was also suggested that this was an impediment to the evidence being fairly adjudicated upon and deprived the appellant of the opportunity to properly put his case.

The defendant appealed against the decision on the ground, among others, that the judge's interventions made a fair trial impossible.

The Court of Appeal noted that the trial judge had described himself as having an 'over-eager desire to get to grips with the case', but the question to be decided was whether the judge had become so involved in the examination of witnesses that he had either made it impossible for the appellant's case to be conducted properly or lost the ability to reach balanced and objective conclusions on the evidence.

His interventions, it said, were excessive, and he should have attempted to postpone his questioning until after cross-examination, except where it might have been necessary to ask the witness to clarify an answer. There was no doubting that the judge's enthusiasm had continually interrupted the witness examination. However, the trial had been fair, with a proper judicial determination of the main issues.

The Court of Appeal considered an earlier decision in *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281. In that case, a judge hearing a landlord and tenant dispute had made constant and frequently contentious interventions during the oral evidence. Furthermore, there had been no rational basis for the judge's findings in relation to one of the parties' entitlement to housing benefit, and his whole approach to a rent arrears issue was fundamentally flawed. Therefore, his conclusion on reasonableness in relation to that issue could not stand. With specific reference to the judge's interventions, the court said that the judge's constant and frequently contentious interventions during oral evidence served to cloud his vision and judgment to the point where he was unable to subject the oral evidence to proper scrutiny and evaluation. A retrial was ordered.

Bullying, hostile or lacking in fairness

It seems that the crucial point here is the element of 'unfairness'. In distinguishing the decision in *Southwark*, the court in *Shaw* said that if the judge's treatment of the witnesses displayed a hostility that gave an impression of bias or a lack of objectivity, a retrial would have had to be ordered. However, although the judge had displayed understandable criticism and disapproval of the appellants' explanation in relation to a side issue, he had not approached the issues concerning determination of the boundary and the scope of the right of way in a hostile or unfair manner. The court considered that, although the judge's questions and interventions had been frequent and excessive, he had nevertheless permitted counsel to ask all the questions they wished, and had not bullied the expert witnesses. The judge's conduct did not, therefore, make the trial unfair.

At first reading it is, perhaps, not obvious how the distinction arises. Perhaps it might be explained thus. The judge in *Southwark* had not merely erred in the nature of his interjections, but had failed in other crucial respects which made his findings unsafe. His interjections were ruled unfair not because they were too frequent or excessive, but because they were deemed bullying, hostile and lacking in fairness. Although the interjections by the judge in *Shaw* might have been unwelcome and even oppressive to the parties, they were put with courtesy and did not, it seems, stray into the area of hostility or bias. The judge, it was said, had not directly examined the witnesses on the core issues and, although his questioning was ill-advised and excessive, it did not create an impression of bias or lack of objectivity. His judgment, said the court, was unimpeachable.

However, in giving the ruling, Sir Geoffrey Vos expressed the hope that, in future: '... judges will temper eagerness with restraint, because continuous interruptions during cross-examination can so often do more harm than good.'

Conclusion

Developments in the law over the previous decade or so have resulted in judges being encouraged to take a more proactive role in proceedings. Indeed, in many ways judicial intervention is seen as a virtue. However, cross-examination of expert witnesses, or over-enthusiastic and frequent interruption thereof, should never be regarded as the function of the judge. One hopes that the remark of Sir Geoffrey Vos will be heeded. NLJ

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