23/11; [2011] VSC 294

SUPREME COURT OF VICTORIA

HODGSON v AMCOR LTD (No 6)

Vickery J

22 June 2011

PRACTICE AND PROCEDURE – APPLICATION BY A PARTY TO EXAMINE A WITNESS IN THE SAME INTEREST IN A JOINT TRIAL BY ASKING NON-LEADING QUESTIONS – APPLICATION GRANTED IN THE INTERESTS OF JUSTICE – CROSS-EXAMINATION OF A WITNESS IN THE SAME INTEREST CONSIDERED AND COMPARED – VALUE OF SUCH CROSS-EXAMINATION CONSIDERED – CONTROL OF EXAMINATION BY THE COURT CONSIDERED – DIRECTIONS GIVEN AS TO PROCEDURE TO BE FOLLOWED: *EVIDENCE ACT* 2008, SS11(1), 26, 27, 28, 42; *CIVIL PROCEDURE ACT* 2010, PART 2.3, SS25, 47, 49.

After a witness had been cross-examined, counsel sought to ask the witness non leading questions. Section 27 of the *Evidence Act* 2008 ('Act') provides that a party may question any witness except as provided by the Act.

HELD: Application granted.
1. Whilst the nature of cross-examination is not defined in the Act, the common law has long provided that cross-examination may consist either of non leading questions being put to the witness or more commonly, leading questions being put. The court retains control over the questioning of a witness.

2. Being satisfied that the matters upon which counsel sought to examine the witness were relevant to his case and in the interests of conducting a fair trial, examination of the witness was allowed to take place.

3. The Court set out the procedure to be followed. See [27].

VICKERY J:

1. There are two proceedings before the Court, namely the Hodgson proceeding (No.9420 of 2004) and the Barnes proceeding (No.8181 of 2004). This trial has been conducted concurrently with evidence called in one proceeding being evidence in the other.

2. In the course of the trial Mr Sangster who is the fifth defendant in the Barnes proceeding, and who appears as a self represented litigant, completed his evidence-in-chief. He was then cross-examined by junior counsel for the Amcor parties, Mr Fitzgerald. The Amcor parties are the plaintiffs in the Barnes proceeding.

3. At the conclusion of the cross-examination, I invited Mr Sangster to respond to anything put to him in the course of his cross-examination which he considered he had not answered fully. Mr Gunst QC, senior counsel for Mr Hodgson, then rose to his feet and said, "Your Honour, should any other party who wishes to cross-examine Mr Sangster go before he is ready to re-examine himself."

4. Discussion then continued during which it became clear that Mr Gunst did not seek to cross-examine Mr Sangster but rather to ask him non-leading questions.

5. Mr Houghton QC, senior counsel for the Amcor parties, drew my attention to the expression "cross-examination" as defined in the dictionary to the *Evidence Act* 2008 ("*Evidence Act*"):

> A reference in this Act to cross-examination of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.[1]

6. As observed by Mr Houghton in submission, the nature of cross-examination is not defined in the Act. However the common law has long provided that cross-examination may consist either

of non-leading questions being put to the witness or more commonly, leading questions being put.

7. Reference was also made to the observations of Ryan J in *LGM v CAM*[2] where his Honour described the principles which should apply in cross-examination. His Honour summarised the position in these terms:

> Cross-examination is the testing of a witness as to the facts in issue or credit. There is no right of cross-examination and it is permitted by a judge in the exercise of his or her discretion to ensure that the parties have a fair trial. A witness that is called to give evidence may be cross-examined. In general the party or the legal representative of a party may cross-examine a witness not called by that party. It is not necessary that the witness has given evidence against the party seeking to cross-examine, it is permissible to ask leading questions in cross-examination but there is no absolute right.

8. Mr Gunst in his submissions relied upon s27 of the *Evidence Act*, which provides: "A party may question any witness except as provided by this Act."

9. It was submitted by senior counsel for the Amcor parties, which I accept, that s27 is necessarily limited. It does not address the question as to when a party may question any witness, nor does it prescribe how the questioning of a witness may be conducted. It was submitted that these matters are necessarily left to other provisions of the Act, including s26 of the *Evidence Act*.

Section 26 provides:

> The court may make such orders as it considers just in relation to—
> (a) the way in which witnesses are to be questioned; and
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> (b) the production and use of documents and things in connection with the questioning of witnesses; and
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> (c) the order in which parties may question a witness; and
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> (d) the presence and behaviour of any person in connection with the questioning of witnesses.

10. Reference is also made to the capacity of the Court to control the questioning of a witness prescribed by s49 of the *Civil Procedure Act* 2010. Section 49 provides:

> (1) In addition to any other power a court may have, a court may give any direction or make any order it considers appropriate to further the overarching purpose in relation to the conduct of the hearing in a civil proceeding.
> (2) A direction or an order under subsection (1) may be given or made by the court at any time—
> (a) before a hearing commences; or
> (b) during a hearing.
> (3) Without limiting subsection (1), a court may give any direction or make any order it considers appropriate with respect to—
> (a) the order in which evidence is to be given and addresses made;
> (b) the order in which questions of fact are to be tried;
> (c) limiting the time to be taken by a trial, including the time a party may take to present the party's case;
> (d) witnesses, including—
> (i) limiting the time to be taken in examining, cross-examining or re-examining witnesses;
> (ii) not allowing cross-examination of particular witnesses;
> (iii) limiting the number of witnesses, including expert witnesses, that a party may call;
> (e) limiting the issues or matters that may be the subject of examination or cross-examination;
> (f) limiting the length or duration of written and oral submissions;
> (g) limiting the numbers of documents to be prepared or that a party may tender in evidence;
> (h) the preparation by the parties of an agreed bundle of documents for use in the proceeding or a schedule summarising business records or other documents;
> (i) the place, time and mode of trial;
> (j) evidence, including, but not limited to whether evidence in chief should be given orally, by affidavit or by witness statement;
> (k) costs, including the proportions in which the parties are to bear any costs;
> (l) any other matter specified in rules of court.

11. Mr Gunst submitted that the right granted by s27 was not qualified by anything in the *Civil Procedure Act*. He relied upon s11(1) of the *Evidence Act* which provides:

> The power of a court to control the conduct of a proceeding is not affected by this Act except so far as this Act provides otherwise expressly or by necessary intendment.

12. He submitted further that r27 of the *Evidence Act* applied to an examiner asking non-leading questions of a witness.

13. This may be contrasted with s42(1) of the *Evidence Act* which provides that a party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it. In disallowing a question or questions put in cross-examination, the Court may take into account, amongst other things, the matters referred to in s42(2). These include situations where:

> (b) the witness has an interest consistent with an interest of the cross- examiner or
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> (c) the witness is sympathetic to the party conducting the cross-examination either generally or about a particular matter.

14. As was observed by Weinberg J, as he then was, in *Cheers v El Davo Pty Ltd*[3], the manner in which these provisions in s42 of the *Evidence Act* are to be applied must turn upon the particular circumstances which prevail in any particular case.

15. Prior to the enactment of the *Evidence Act* the common law made provision for the examination and cross-examination of witnesses. Young J in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd*[4] reviewed and summarised the relevant authorities in the following way: Drawing all these threads together, the following appears to me to be the situation.

> 1. The only actual "right" is the right to have a fair trial.
> 2. It is the duty of the trial judge to ensure that all parties have a fair trial.
> 3. In carrying out his duties the trial judge must so exercise his discretion in and about the examination and cross-examination of witnesses that a fair trial is assured.
> 4. Ordinarily, a judge in carrying out his duty will see that the trial is conducted in the manner that is commonly used throughout the State, namely that witnesses are examined, cross-examined and re-examined.
> 5. Where there is more than one counsel for the same party, then ordinarily the judge will not permit any more than one counsel to cross- examine the same witness.
> 6. Where there are parties in the same interest, the judge will apply the same rule as stated in (5).
> 7. Where the issues are complex and there is no overlapping of cross-examination and the proposal is outlined before cross-examination begins, it may be proper for the judge to permit cross-examination of one or more witnesses by more than one counsel in the same interest notwithstanding *prima facie* rules (5) and (6).
> 8. It may be that in the interests of time or to prevent "torture" of the witness or for other good reasons, a judge may in special circumstances limit cross-examination. Such a situation would occur where, for instance, there was only a fixed amount of time before an event occurred and a decision was essential before that event occurred.
> 9. It is usually not proper to indicate at the commencement of the hearing that cross-examination will be limited to X minutes subject to the right to make an application for an extension, although such a ruling might be justified if time was limited. It would, however, appear to be proper for the judge to say, at any stage during the cross-examination, that he would, unless convinced that the cross examiner was being of more assistance to the court, curtail cross-examination in Y minutes time. This power would of necessity be used sparingly.
> 10. Group cross-examination either by all counsel cross-examining the witness at one time or a group of witnesses being cross-examined by one counsel at the same time is not a procedure that should be permitted.
> 11. In all proceedings, the court has a duty to prevent cross-examination purely for a collateral purpose or to "torture" the witness.
> 12. In interlocutory proceedings, especially proceedings for an interlocutory injunction, the collateral purpose rules must be looked at very closely because ordinarily it is not proper to permit counsel to go on a fishing expedition and all that the plaintiff need show is a prima facie or strongly arguable case on the merits. Cross-examination on laches, balance of convenience etc is, of course, in a different plight.
> 13. Ordinarily a judge should permit cross-examination of all witnesses by all counsel unless one or more of the above rules apply.

16. These observations were cited with approval by Lindgren J in *NMFM Property Pty Ltd v Citibank*.[5]

17. Ordinarily where two or more parties are in the same interest, the trial judge's discretion at common law may be properly exercised if not more than one counsel is permitted to cross-examine. This approach was emphasised in *LGM v CAM*, a decision of O'Brien J, where his Honour observed: "The established practice is that a party will not be permitted to cross-examine another party which has a common interest."[6] His Honour further recognised that this practice may be departed from, but when departing from the practice, it is usual that the court will require special circumstances to justify the departure.[7]

18. Of relevance to the exercise of the discretion to permit a cross-examination in these circumstances are the observations of Heydon J in *Kirk v Industrial Relations Commission of New South Wales*[8] where his Honour said:

> The law grants considerable power to a cross-examiner to employ leading questions and otherwise to operate free from some of the constraints on an advocate examining in chief. It does so for particular reasons. In New South Wales at least, normally in a criminal case, an advocate cross-examining an accused person will have no contact with the witness being cross-examined before the trial, and will have no instructions about what that witness will say, apart from whatever the witness said to investigating officials acting on behalf of the state or to other persons to be called as witnesses in the prosecution case or in documents to be tendered in that case. But a cross-examiner's ordinary powers are, in a practical sense, much diminished when the witness being cross-examined is the client of the advocate conducting the cross-examination.
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> The cross-examiner who persistently asks leading questions of a witness in total sympathy with the interests of the cross-examiner's client is employing a radically flawed technique. The technique is the more flawed when the witness is not merely in total sympathy with the client, but actually is the client. For an inevitable appearance of collusion between an advocate and a client who had many opportunities for pre-trial conferences is suggested by the persistent use of leading questions in these circumstances. It is an appearance which is likely to be ineradicable and which is likely to cause the value of the evidence to be severely discounted. This risk is avoided if the client is giving the evidence in chief rather than under cross-examination, for the client's advocate is severely restricted in the capacity to ask leading questions in chief.

19. For these reasons I expressed a disinclination to permit Mr Gunst to cross-examine Mr Sangster. The weight of such evidence, if adduced, would necessarily be limited.

20. However, in the course of argument, Mr Gunst made it plain that he did not seek to ask leading questions of Mr Sangster by way of cross-examination. Rather, he sought to put non-leading questions. He relied for this purpose on s27 of the *Evidence Act*.

21. Nevertheless, even a non-leading examination is amenable to control by the Court. In this regard, reference is made to the observations of McClellan CJ in Eq, in *Lane v Jurd* where his Honour said:

> However, although a party has a right to question a witness in a trial such as this by asking non-leading questions of the witness which are relevant to the issues being tried, the court retains control over the questioning of the witness.[9]

The capacity to control such an examination is provided by s27(6) of the *Evidence Act* and s49 of the *Civil Procedure Act* 2010, and is not diminished by s11(1) of *the Evidence Act*.

22. Section 28(a) *Evidence Act* is also relevant. This deals with the order of examination-in-chief, cross-examination, and re-examination. In particular, s28(a) provides that "unless the court otherwise directs, cross-examination of a witness is not to take place before the examination-in-chief of the witness".

23. In this case Mr Fitzgerald without any objection from any party, already completed his cross-examination of Mr Sangster. It is therefore necessary in my opinion for Mr Gunst to make application to examine Mr Sangster at this stage of the proceeding in order to comply with s28 of the *Evidence Act*. It is noted that, in the interests of the orderly conduct of the trial it would

have been desirable for Mr Gunst to have examined Mr Sangster before cross-examination was conducted and completed.

24. Senior counsel for the Amcor parties submitted that counsel for Mr Hodgson had no right to examine Mr Sangster because he had closed his case, subject to the right to tender certain documents and call an expert. However, I take the view that although he closed his case in the manner described, he has only closed his case in relation to the witnesses he sought to call and the documentary evidence he has adduced, which was either tendered through his witnesses or by consent.

25. The closure of Mr Hodgson's case in this sense does not disentitle his counsel from asking non-leading questions of other witnesses, provided the questions are directed to matters of relevance in the trial and are otherwise proper questions. The closure of his case does not require any application to re-open it for this purpose.

26. I am satisfied that the matters upon which counsel for Mr Hodgson seeks to examine Mr Sangster are relevant to his case. Accordingly in the interests of conducting a fair trial, I will permit the examination to take place.

27. However for the purposes of case management, applying s26 of the *Evidence Act* 2008 and bearing in mind the overarching purpose prescribed by the *Civil Procedure Act* 2010, both as it applies to practitioners under Part 2.3 of the Act and to the Court under s47 of the Act, the examination of Mr Sangster is directed to proceed in the following manner.

(1) Only non-leading questions may be put to Mr Sangster.
(2) The questions must be relevant to the issues at trial and otherwise be proper questions.
(3) Other parties will be given a like facility.
(4) Junior counsel for the Amcor parties, Mr Fitzgerald, will be permitted to cross-examine Mr Sangster on the issues raised in these examinations.
(5) No party will be permitted to re-examine on the further cross-examination. This is because Mr Sangster is not called as a witness by any other party.
(6) Mr Sangster at the conclusion of the process will be given the opportunity to clarify any matter previously put to him which he considers is necessary for further explanation.
(7) Mr Gunst QC has given an estimate of 30 to 40 minutes for his examination of Mr Sangster. Counsel is requested to observe this timeframe in the course of complying with the overarching obligation to minimise delay in the trial pursuant to s25 of the *Civil Procedure Act.*

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[1] [1999] FCA 266 at [13]. See too Lindgren J in *NMFM Property Pty Ltd v Citibank*.
[2] [2008] FamCA at 185 and at Paragraph 207.
[3] VG 106 of 1997 at Paragraph 9.
[4] (No.3) (1990) 20 NSWLR 15 at Paragraphs 22 to 23.
[5] (No.8) [1999] FCA 266; (1999) 161 ALR 581 at 584.
[6] At Paragraph 210; *Cheers* v *El Davo Pty Ltd* is cited as well as NMFM.
[7] At Paragraph 211.
[8] [2010] HCA 1 at 117; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[9] 40 NSWLR 708 at 709.

APPEARANCES: For the plaintiff Hodgson: Mr C Gunst QC with Mr P Booth, counsel. AJ Macken & Co, solicitors. For the defendant Amcor Ltd: Mr WT Houghton QC with Dr SB McNicol and Mr G Fitzgerald, counsel. Corrs Chambers Westgarth, solicitors.
