Evidence in Civil Proceedings – an update

Insights - 25/05/2016

Evidence in Civil Proceedings – an update

On 22 February 2013, Ogier published an article examining the provisions of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 (the "Law"). A link to that article can be found here.

Mathew Newman, a partner in Ogier's Dispute Resolution team, examines the practical impact of the Law and the accompanying rules (the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 (the "Rules")) and relevant Guernsey case law in the last 3 years.

Have matters improved?

The benefits conferred by the Law and Rules have been noticeable. As witness statements now stand as evidence in chief, there is a much more "cards on the table" approach with parties understanding the extent of the evidence a witness is going to give prior to trial. This allows the issues in dispute to be narrowed and the parties to prepare their cross examination much more effectively, saving time and costs and enabling the parties and the Court to get to the root of the dispute much quicker.

In addition, some statements will simply be unchallenged (i.e. the other party will not call for that witness to be cross examined) which again results in a significant time and cost saving. The ability for the judge and Jurats to read the evidence a witness is going to give in advance of a trial, and to consult their written statement post-trial whilst forming their decision, also appears to have been invaluable.

Choosing which of the other side's witnesses you wish to cross examine has become a tactical decision. There is a real balance to be struck between calling a witness your client wishes you to cross examine because they are a "bad egg" and giving such "bad eggs" (who are often in civil cases flamboyant and charming) the floor.

Thus, adducing witness evidence has become a much more refined process. There is much less of the "rough and ready" approach to cross examination and pre-trial tactics play a much larger role.

Potential Problems

The witness statements have been served, you have requested that a witness be cross examined, and the other party serves a hearsay notice on you late informing you that the witness will not be attending trial such that you are denied your opportunity to cross examine them. What happens?

This is what occurred in Nora Cooney –v- AFR Executors (Guernsey) Limited et Autres where a trial of the preliminary issue of domicile took place. The Plaintiff (Nora) was seeking a declaration that her deceased husband was domiciled in Jersey at the date of his death. She had issued proceedings in both Guernsey and Jersey. The declaration was opposed by one of her sons and her two granddaughters (the Defendants) but supported by two of her other children (the Interested Parties). As executor, the First Defendant remained neutral, hence references to "Defendants" do not include the First Defendant.

5 days before the trial of the preliminary issue was due to commence, Nora served a hearsay notice stating that she was unable to attend trial to give oral evidence. The Defendants wished to cross examine her. The hearsay notice referred to the reasons why Nora was not to be called to give evidence, which were that she was "82 years old, resident in England, frail and suffering from ischaemic heart disease". It also referred to her being taken to hospital suffering from chest pains two months earlier, that she had seen her GP the day before the hearsay notice was served and that the GP had "expressed concern about the impact of giving evidence on Mrs Cooney's health".

However, the letter from the GP actually stated "On 24th September 2015 she attended with chest pain, as a consequence she was admitted to Royal Lancaster Infirmary and her cardiac medication was reviewed. Since then Mrs Cooney reports that her angina is well controlled and she has not had any further episodes of chest pain and her activities of daily living are not limited. However Mrs Cooney is concerned that the chest pains that led to that admission may have been brought on by conversations she had with friends that were staying at the time regarding the impending court case. As a consequence Mrs Cooney is concerned about similar chest pains developing as a result of being directly involved in the case."

Service of the hearsay notice was not in accordance with the Rules and therefore a question arose as to the admissibility of Nora's evidence. Section 2(5) of the Law provides that such failure to comply does not affect the admissibility of the evidence but may be taken into account by the Court in considering the exercise of its powers with respect to the course of proceedings and costs, and as a matter adversely affecting the weight to be given to the evidence.

In this instance, the judge referred to section 4 of the Law and directed the Jurats that in estimating the weight, if any, to be given to Nora's evidence, they should have regard to any circumstances from which any inference could reasonably be drawn as to the reliability or

otherwise of the evidence. He also directed them, inter alia, that regard could be had in particular to (1) whether it would have been reasonable or practicable for Nora to attend to give evidence; (2) whether Nora had any motive to conceal or misrepresent matters, (3) whether the circumstances in which the evidence was adduced as hearsay suggested an attempt to prevent proper evaluation of its weight, and (4) any other circumstances which in the interests of justice are considered relevant.

It was further highlighted that there had been a pre-trial review some 4 weeks before the trial where no mention had been made of Nora's admission to hospital in September and there had been no suggestion she might not attend to give evidence. Further, the lateness of the indication she would not attend meant there was no opportunity to consider taking her evidence by video link or commission rogatoire.

Based on all of the above, the Jurats found that Nora had taken a deliberate decision not to attend the trial. They particularly noted that it was highly unusual for a party not to give evidence on their own behalf, particularly in a case where the declaration sought required such close analysis of the facts. The medical evidence did not support a case where the GP was advising against Nora participating in the trial. It simply relayed what Nora had herself told the doctor.

The Jurats therefore decided that as it would have been reasonable and practicable for Nora to have given evidence, her late indication that she would not do so was an attempt to prevent the proper evaluation of the weight to be given to it and this, it must be given less weight than if it had been tested and withstood cross-examination.

Lessons to be learned?

A party serving a late notice late takes a number of risks. Although not determined in the above case, the Court retains the power by virtue of its inherent jurisdiction, to exclude hearsay evidence, though this will be unusual. The more likely outcome is that the Court may adjourn the trial and order that the costs of and occasioned by such adjournment be borne by that party. Alternatively, the Court may permit the statement into evidence, allow the trial to proceed and simply direct the Jurats as to the weight they might want to give such evidence.

It goes without saying that if a party serves a late hearsay notice, without proper grounds and evidence, the Jurats may well choose to give such evidence little or no weight. Further, the Court may mark its disapproval by way of awarding costs against that party. The Court will be particularly unimpressed if, at the time of any pre-trial review, there is a real possibility a witness will not be able to attend for cross examination, and the Court and other party are not made aware.

Thus, the issue of serving a hearsay notice, and indeed receiving one at a late stage and how to deal with it becomes a real tactical consideration.

Expert Evidence

For the first time, the Rules have granted the Royal Court specific powers to control the way expert evidence is acquired and given.

The duty to restrict expert evidence to what is reasonably required to resolve proceedings has resulted in the Court taking a more interventionist approach and parties are now being pressed to justify (if not obvious) why they require particular experts, particularly if an expert in more than one field is required. This is important, since it forces the parties to really focus on the key issues of the dispute and where they need expert assistance, which results in a costs saving and a more focused approach.

A recent example was EFG Private Bank (Channel Islands) Limited –v- BC Capital Group SA (In Liquidation) & Ors, where the First to Fourth Respondents sought permission to call an expert or put in evidence an expert's report limited to the field of forensic accounting. They had already obtained what was effectively a "desk top" report from an expert in such field to assist with tracing their claim to assets held by the bank (who were interpleaders) however, the Fifth to Eighteenth Respondents objected on the basis that the report did not offer opinion evidence, such that it fell outwith the regime to which the Rules applied. The argument was that the report was evidence that an individual giving factual evidence could give and was not independent of one of the parties, thus should not be treated as being the report of an expert.

The Court held it was "just" satisfied that the report contained opinion evidence but stated that it would have been more helpful to have had a report that set out the work undertaken in the field of expertise and then set out more directly what the opinions as to the consequences of that analysis were. Importantly, the Court also held there was a danger in looking too closely at the approach that would be taken in England and Wales in cases such as these, recognising that in a small jurisdiction like Guernsey, full-time judiciary tended to be generalists rather than the specialists one might find in the English Commercial Court, thus the potential need for expert evidence to be reasonably required would be proportionately greater. Further, when considered in light of the normal position of the Court at trial being constituted with Jurats, the likelihood potentially increased again, so that every person involved in fact finding would be equally well placed to make findings delivering justice. As a result, the application was granted.

Expert reports are now given in written format and as with witness statements, stand as their evidence in chief which allows the parties to better understand the issues in dispute, the evidence and prepare their cases. In addition, the Court is more frequently directing discussions between experts to attempt to narrow the issues further and save costs. Importantly, the contents of such discussions cannot be referred to at trial unless the parties agree. This is a useful provision since it allows experts to discuss matters freely without fear that what they say in such joint discussions (which may often be no more than teasing out the issues rather than giving their formal considered opinion) is going to be used against them.

If the Court directs a discussion between experts, there is also usually a direction for the preparation of a joint statement setting out on which areas the experts agree, and where they disagree with reasons why they disagree. Again, this is designed so that all parties and the Court can better understand the "live" issues in dispute (which have often narrowed and refined since the proceedings commenced) and focus the time available on them. However, it is important that experts are given appropriate input by the parties' legal advisors during the preparation of the joint statement to ensure that further issues are not being created.

Conclusion

We are starting to notice the impact of the Law and Rules on how cases are litigated and progressed. An eye must always be had to the procedural requirements and how the evidence might be received by the Court. It is particularly important to ensure that all evidence a witness wishes to give in chief is contained within their statement since supplementary statements or further questions in chief at trial may not be permitted.

It is likely that there will be further developments in respect of permission to use expert evidence and also possibly striking out parts of witness statements and Ogier will report on these in due course.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Simon Davies

Partner

Guernsey

E: simon.davies@ogier.com

T: +44 1481 737175

Key Contacts

Mathew Newman

Partner

Guernsey

E: mathew.newman@ogier.com

T: +44 1481 752253

Related Services

Dispute Resolution