

Ultraframe (UK)Ltd v Fielding & Others [2005] EWHC1638 (Ch)

Extract from judgment of Mr Justice Lewison

*Witness training*

22. Most of the witnesses called by the Burden Defendants had received witness training for a day or thereabouts, a couple of months before the trial began. This fact was elicited by Mr Hochhauser in his cross-examination of the witnesses; although he did not then explore the content of the training, or the effect it had on the witnesses. However, Mr Roche volunteered the opinion that it was “about as much use as a chocolate fireguard”. During the course of the trial the Court of Appeal (Criminal Division) gave judgment in *R v. Momodou* [2005] 2 All ER 571. They said this about witness training in criminal trials:

“61. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See *Richardson* [1971] CAR 244; *Arif*, unreported, 22nd June 1993; *Skinner* [1994] 99 CAR 212; and *Shaw* [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be “improved”. These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

62. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants.

Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.”

23. In *Momodou* the court went on to indicate the procedure that should be followed if witness familiarisation takes place:

“64. This familiarisation process should normally be supervised or conducted by a solicitor or barrister, or someone who is responsible to a solicitor or barrister with experience of the criminal justice process, and preferably by an organization accredited for the purpose by the Bar Council and Law Society.

None of those involved should have any personal knowledge of the matters in issue. Records should be maintained of all those present and the identity of those responsible for the familiarisation process, whenever it takes place. The programme should be retained, together with all the written material (or appropriate copies) used during the familiarization sessions. None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events....

65. All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the Crown Prosecution Service as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed. It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed the trial itself, to see that this guidance is followed.”

24. I was also taken to the ruling of Pitchford J in the Crown Court at Chester in *R v. Salisbury* (unreported 19 May 2004). Pitchford J said this:

“28. The course was delivered by a member of the Bar I judge to have been well aware of the implications. She took pains to ensure that any witnesses who attended her courses knew of the possible consequences of collusion and she forbade it. No attempt was made to indulge in application of the facts of this case or anything remotely resembling them. True it is that witnesses would have undergone a process of familiarization with the

pitfalls of giving evidence and were instructed how best to prepare for the ordeal. This, it seems to me, was an exercise any witness would be entitled to enjoy were it available. No one engaged in special pleading with a view to gaining any expertise beyond the application of sound common sense.

29. I do not accept that this training, if such is the correct description, was capable of converting a lying but incompetent witness into a lying but impressive witness. Having considered the course content in some detail it seems to me that witnesses have gained only a rudimentary understanding of what was to come and received no coaching in how to lend a specious quality to their evidence. What they would have received was knowledge of the process involved. It was lack of knowledge and understanding which created demand for support in the first place. Acquisition of knowledge and understanding has probably prepared them better for the experience of giving evidence. They will be better able to give a sequential and coherent account. None of this gives them an *unfair* advantage over any other witness. Although ease of manner or confidence in the witness box, if it exists, may be a matter of consideration by a jury, it does not seem to me that the ultimate judgment whether the witness is credible or not will depend on such considerations.”

25. There are, of course, significant differences between civil and criminal procedure. Not least, in civil cases evidence in chief generally takes the form of a pre-prepared witness statement, whereas in criminal cases it is elicited by (non-leading) question and answer; and in civil cases witnesses are normally permitted to sit in court while other witnesses are giving evidence, whereas in criminal trials this does not happen until the witness has given his own evidence; and even then it is unusual. In criminal cases witnesses do not see each other's statements or depositions; whereas in civil cases it is common for witnesses to see and respond to the statements of other witnesses. Nevertheless, the principle that a witness' evidence should be his honest and independent recollection, expressed in his own words, remains at the heart of civil litigation too. In the light of the disappearance of oral evidence in chief from civil cases, it may be thought that the importance of the witness's own independent recollection in giving his evidence under cross-examination is all the greater.

26. As a result of my reading *Momodou*, and at my request, I was provided with an account of the witness training that the Burnden Defendants' witnesses had received. Mr Naden received much the same training. The training was conducted by Bond Solon, who are well-recognised in this field, and have an impressive client list (which includes many of the firms of solicitors involved in this case). I received a letter from Bond Solon which indicated that they followed the guidelines in *R v. Salisbury* (the training having taken place before *Momodou*). Mr Hochhauser did not challenge this.

Bond Solon's brochure asks and answers a number of questions. One of them is: **“Isn't there a danger of “coaching” or over preparation?** No. We have checked very carefully with The Law Society and The General Council of the Bar about the rules governing witness preparation. We do cross examine them, but not on the fact of an

upcoming case. Witnesses learn the principles of cross-examination without the slightest hint of coaching.”

27. The information given to the potential witnesses in preparation for their session tells them not to speak to the trainers about their evidence in any live case and includes the following:

“Lawyers are not allowed to “coach” or influence witnesses in respect of their evidence: to do so puts the in breach of their professional conduct rules and may result in them being struck off. You, as an individual witness, might be prosecuted for perverting the course of justice if you have participated in any coaching or manipulated your evidence. Remember, every witness, in every legal forum, must tell the truth, the whole truth and nothing but the truth.”

28. The first part of the programme was an introduction to the theory, practice and procedure of giving evidence. Mr Hochhauser criticised this as giving the potential witnesses advice on how to behave in court (“stand with your feet pointing at the decision maker”; “walk slowly and purposefully to where you will be giving evidence from”). I do not see anything objectionable in any of this. It is a common experience that anxious witnesses are given general guidance on how to behave in court (listen carefully to the question; don’t lose your temper etc).

29. The second part of the session consisted of a mock cross-examination. The brochure said that Bond Solon would have no details at all on the forthcoming case. However, it also indicated that the training could take place on the basis of fictitious case studies prepared either by Bond Solon themselves, or on the basis of case studies prepared by the client. In the present case, the case studies were prepared by Bond Solon, but chosen from a range by Addleshaw Goddard. But in at least two sessions they were not used; and the potential witnesses were allowed to make their own case studies or choose the subject-matter upon which to be cross-examined. Given that the trainers do not themselves know the subject or scope of the forthcoming trial, it seems to me to be highly undesirable for the potential witnesses to compile their own case study, or choose their own topics for cross-examination. If they do so, how are the trainers to know how much resemblance (if any) it bears to the subject-matter of the litigation? If it does resemble the forthcoming trial, the danger of inadvertent coaching is increased. Yet that is what happened in the present case. It should not have happened; and I hope it will not happen again. It was also disturbing that the course of the witness training came out piecemeal; and that a clear and comprehensive account was not given at the first time of asking.

30. Nevertheless, with the possible exception of Mrs Fielding’s session, the case studies were sufficiently far removed from the issues in this case as not to give rise to any inference of coaching. Moreover, since it was not put to the witnesses that the training had taught them anything in particular or had caused them to change their evidence, it would, I think, be unfair to use the fact of the witness training to draw any adverse inference against them.

31. I was invited by Mr Hochhauser to give guidance on the permissible limits of witness familiarisation. That question raises very difficult issues, both of law and professional conduct, which must be the subject of wide consultation before any conclusions can be reached. I understand that the professional bodies are already engaged on that task. With some relief, I decline Mr Hochhauser's invitation.